

2012 WL 6759769 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Nancy B. RAMSEY, Plaintiff- Appellant,
v.
BAXTER TITLE COMPANY, et al., Defendants - Appellees.

No. CUM-11-594.

February 13, 2012.

On Appeal from the Order of Dismissal Dated December 23,2009 of the Cumberland County Superior Court

Brief for the Plaintiff - Appellant - Nancy B. Ramsey

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***2 STATEMENT OF ISSUES**

I. Do the facts alleged in Appellant's First Amended Complaint, and all inferences derived from the allegations, establish a claim against Baxter Title Company and James R. Lemieux for a violation of a duty of care to Nancy Ramsey in the closing of the loan which is the subject of her Amended Complaint?

II. Should Appellants punitive damage claim against Baxter Title Company and James R Lemieux have been dismissed by the Cumberland County Superior Court?

ARGUMENT

I. The facts alleged in Appellants First Amended Complaint, and all inferences derived from the allegations, establish a claim against Baxter Title Company and James R. Lemieux for a violation of a duty of care to Nancy Ramsey in the closing of the loan which is the subject of her Amended Complaint?

II. Appellant's punitive damage claim against Baxter Title Company and James R. Lemieux should not have been dismissed by the Cumberland County Superior Court?

***3** It is ironic Appellant's brief in this case is delivered to the Clerk of the Maine Supreme Court on the first business day after the State of Maine, along with 49 other states, entered into the so-called \$25 Billion Nationwide Foreclosure Settlement to address foreclosure abuses, some of which were discovered by a Maine attorney in a Maine civil action foreclosure. The Maine Attorney General's office participated in the negotiations which concluded with this historic Settlement.

Years before this Nationwide Settlement, the State of Maine addressed the mortgage crisis as it affects Maine families who struggle to remain in their homes. The so-called mortgage crisis has shaken the State of Maine and the United States' economy to its core, causing the most severe recession since the Great Depression. The economy of the United States and the entire world has yet to recover from the bursting of the debt and housing bubbles. Unfortunately, it appears the country and the State of Maine have many more years of foreclosures, displacement of families and **financial** pain.

In light of the credit and housing crash the Maine Legislature and Maine Supreme Court acted responsibly to address the harm caused to Maine families. In 2009 the Maine Legislature passed and the Governor signed the new statute, [Title 14, MRS §6321-A](#), Foreclosure Mediation Program. In short, the Maine Program for foreclosures of a Maine resident's primary residence requires good faith mediation between the mortgagee and mortgagor. This legislation addressed the reality facing Maine families that it is nearly impossible to reach a reasonable resolution of a troubled mortgage outside the ***4** legal requirement of good faith mediation by the parties. The legislation was necessary because the reality of what was happening to Maine families was inconsistent with assurances from mortgagees; and, establishment of nationwide programs by the federal government. The Maine legislation did not 'buy' into the fiction that the industry was treating families fairly.

The Maine Supreme Court first shouldered the responsibility to protect Maine families struggling in the foreclosure process. After a trial period in 2009, the Court promulgated [M.R.Civ.P. 93](#), Foreclosure Diversion Program which governs all foreclosures of owner occupied primary residences for Maine residents commenced after December 31, 2009. Also, on December 31, 2009 the Law Court issued its landmark opinion in [Chase Home Finance, LLC v. John H. Higgins, et al](#), 2009 [ME 136](#) which provided clearly for the citizens of Maine the detailed and specific requirements for foreclosure civil actions for primary residences.

This appeal addresses the responsibility of the closing title company and closing attorney in a Maine residential mortgage transaction. It addresses the 'fiction' that the transactions which now are the cause of the crisis were simple, standard, straight-forward closings of standard mortgage loans between a bank and a borrower. They were not. The reality is that these transactions

were extremely complicated. They involved securitizations; government sponsored agencies; mortgage brokers; originators; packagers; servicers; mortgage backed securities; investors; and, closing agents. The typical closing consisted of a package of documents an inch thick. Many of the documents contained single- *5 spaced legalese. Much of the language in the closing documents was incomprehensible even to the sophisticated professional. In most cases the borrower attended the closing without counsel.

The issue in this appeal is whether the closing agent title company and the closing attorney had any duty whatsoever to provide the borrower with any amount of reasonable time to review the documents; to explain anything about the documents to the borrower; or, even answer any questions the borrower had about the closing documents. At its core, this appeal addresses the issue of whether the closing agent title company and the closing title attorney bear any responsibility for the horrific **financial** mess Maine families find themselves confronting today. There are over 5,000 civil action foreclosures commenced each year in Maine. More than 100 new foreclosure cases filed each and every week. And there is no improvement in sight. It is nothing short of incredible. The Maine Legislature and Courts have acted responsibly. It is time to consider and address the possible responsibility of the entities and professionals who closed these loans.

Background

Nancy B. Ramsey is a Maine individual living in her owner occupied primary residence in Freeport. She was born on XX/XX/1939. She has been divorced for many years; and, raised five children as a single mother. She worked for Maine Department of Human Services as a social worker; and, is retired. From 2006 to the present Nancy Ramsey has been a sub-contractor providing personal care to the **elderly** in an assisted living facility.

*6 In July, 2006 one of Nancy Ramsey's sons, who was living with her, was diagnosed with **Multiple Sclerosis**; and, continues to live with her. In July, 2006 Nancy Ramsey decided to re-**finance** her home in Freeport in order to purchase an apartment building where she planned to retire and move her son. She contacted a mortgage broker she had used in the past to **finance** her home and obtained a loan approval from Option One Mortgage Corporation, a subsidiary of H&R Block Bank. At that time Nancy Ramsey had excellent credit with FICO scores of 767, 773 and 784. As part of the loan application Nancy provided the mortgage broker tax returns, W-2s, paycheck stubs, a pension statement and bank statements as proof of her income. After submitting all the information requested, Nancy was informed that the best loan she qualified for was an adjustable rate mortgage with a relatively high initial rate of interest. She was told that these terms were the best the broker could find for her. Unbeknownst to Nancy, H&R Block Bank and the mortgage broker had entered into an agreement whereby the more lucrative the loan was for the Bank, the higher the bonus or kick-back the Bank would pay the mortgage broker. This agreement is known as a yield spread premium (YSP). The mortgage broker informed Nancy Ramsey that the adjustable rate was the best loan for her. When she questioned why the interest rate was so high; she was informed that it was the best program he could find. The mortgage broker did not explain to Nancy Ramsey that the amount of the YSP he was being paid by H&R Block Bank for her loan was directly related to her interest rate; the fact that it was an adjustable rate loan; and, the length of time to the first *7 adjustment. Nancy Ramsey was not informed that the worse the deal for her; the better the YSP for the mortgage broker; and, the more she paid over the life of her loan.

At the closing Nancy paid \$4,200 as a "Broker Fee" to the mortgage broker; a "Processing Fee" of \$712 to the mortgage broker; and, the mortgage broker was paid an additional \$4,200 by H&R Block Bank because the loan was so lucrative for the Bank. Consequently, the mortgage broker was paid a total of \$9,112 of which Nancy Ramsey was unaware. Specifically, Nancy Ramsey did not receive prior to closing the proposed HUD-1 Settlement Statement. Nancy Ramsey did not select Baxter Title Company or James R. Lemieux, Esquire to close the loan on August 14, 2006. The closing was conducted by Attorney Lemieux. During the closing Nancy Ramsey was provided by Attorney Lemieux very quick and brief sum of the documents she signed; but, was rushed and under pressure as she was told by Baxter Title Company another closing was scheduled immediately after hers. Nancy Ramsey's closing lasted twenty minutes.

The YSP program designed by banks to obtain more lucrative loans is one of the primary causes of predatory lending which became common during the debt and housing bubbles. Nancy Ramsey was an easy prey and it was important to the predator that the true details of the YSP program not be explained fully to her at any time during the process. Thus, the failure of the closing title company and closing attorney to provide adequate explanation of *8 the settlement statements and other documents kept borrowers like Nancy Ramsey in the 'dark' and allowed the predatory practices to flourish.

In 2009, after she discovered the full and complete meaning and effect upon her loan of the yield spread premium program, she brought a civil action against H&R Block Bank d/b/a Option One Mortgage Corporation; Our Town Mortgage, LLC, the mortgage brokerage company; Al Staples, the mortgage broker; Associates, the appraisal firm used for the subject loan; William Chapman, the owner of Hillcrest Associates and the appraiser who did the appraisal for Nancy Ramsey's loan; Baxter Title Company, the Maine corporation which was the title company for the closing of the subject loan; James R. Lemieux, the Maine attorney who closed Nancy's loan transaction; and, National Grange Mutual Insurance Company which provided the bond required to be posted by Our Town Mortgage, LLC. The Amended Complaint includes eight counts, two of which apply to Baxter Title Company and James R. Lemieux. Count VII of the Amended Complaint alleges that Baxter Title Company and James R. Lemieux owed a duty to Nancy Ramsey and sought damages caused by the breach of the duty. Count VIII requests punitive damages from all defendants.

After service of the Amended Complaint, Baxter Title Company and James R. Lemieux moved to dismiss Count VII and Count VIII as it applied to them. The trial court granted the motion. Nancy Ramsey filed a timely appeal which was dismissed as premature. All other counts against all other defendants now have either been dismissed by stipulation; dismissed by *9 motion for summary judgment or resulted in a default judgment in favor of Nancy Ramsey. After the final judgment was entered against Our Town Mortgage, Nancy Ramsey filed this timely appeal of the granting of the motion to dismiss Count VII and Count VIII as it applies to Baxter Title Company and James R. Lemieux.

Issues on Appeal

In this appeal, Nancy Ramsey raises the legal issue as to whether she has alleged facts in her Amended Complaint which support the existence of a claim against Baxter Title Company and James R. Lemieux. She alleges that she placed trust and confidence in Baxter Title Company and James Lemieux. She alleges facts which establish a great disparity of position and influence between herself and Baxter Title Company and James Lemieux. Do these facts, when considered true, with all inferences to be determined in favor of Nancy Ramsey and against Baxter Title Company and James R. Lemieux, establish a duty owed to Nancy Ramsey by Baxter Title Company and James R. Lemieux? Nancy argues it is imperative for the administration of justice and for the protection of the public, regardless of the attorneys representation of a lender in a given mortgage transaction; that the attorney and title company owe a duty to the mortgagor, despite the involvement of other non-attorney professionals. Finally, Nancy argues that she has made a prima facie case against Baxter Title Company and James R. Lemieux.

*10 Standard of Review

The Maine Supreme Court "ordinarily review[s] a motion to dismiss by examining the complaint in a light most favorable to the plaintiff and accepting the material facts of the complaint as true. See *Brown v. Maine State Employees Association*, 690 A.2d 956, 958 (Me. 1997) as quoted in *Davric Maine Corporation v. Bangor Historic Track, Inc.*, 2000 ME 102. The Law Court review [s] the courts grant of a motion to dismiss de novo for errors of law. *Persson v. Dept of Human Servs.*, 2001 ME 124, ¶ 8, 775 A.2d 363, 365 ("The legal sufficiency of a complaint challenged by a motion to dismiss is a question of law subject to de novo review by this Court.") (internal quotations omitted), as quoted in *Barbara Hathaway v. City of Portland*; and, *Winter Danforth Corporation v. City of Portland*, 2004 ME 47. Regardless of whether James R. Lemieux and Baxter Title Company represented the lender in the subject mortgage transaction, Baxter Title Company and Attorney James R. Lemieux also owe a duty of care to Nancy B. Ramsey.

ISSUE I: Do the facts alleged in Appellant's Amended Complaint, and all inferences derived from the allegations, establish a claim against Baxter Title Company and James R. Lemieux for a violation of a duty of care to Nancy Ramsey in the closing of the loan which is the subject of her Complaint?

As the closing agent for Nancy B. Ramsey and the lending institution, Attorney James R. Lemieux and Baxter Title Company held certain duties to ensure the proper standards of care were provided to Plaintiff. The factual *11 elements to establish the duty of care and the fiduciary duty of care are (1) that Nancy B. Ramsey was involved in a mortgage transaction Involving her residence; (2) that Nancy B. Ramsey was not represented by separate counsel in said mortgage transaction; and, (3) that James R. Lemieux and Baxter Title Company represented the lender at the closing of the subject transaction and were the closing agent for the lending institution involved in the said mortgage transaction. All the factual elements creating a duty of care and a fiduciary duty of care on the part of James R. Lemieux and Baxter Company are particularly set forth in Nancy Ramsey's Amended Complaint. Based upon the establishment of the duty of care and fiduciary duty of James R. Lemieux and Baxter Title Company; Nancy Ramsey alleges facts upon which a jury can consider and then prove; if by clear and convincing evidence, the conduct was so outrageous that malice may be implied; and a jury may consider punitive damages.

Rule 12(b)(6) Standard

M.R.Civ.P. 12(b)(6) provides for a motion to dismiss for failure to state a claim upon which relief can be granted. In ruling on a motion to dismiss under Rule 12 (b)(6), the court must accept as true all factual allegations in the complaint and construe all reasonable inferences in favor of Plaintiff. *Thibeault v. Larson*, 666 A.2d 112, 114 (Me. 1995). A dismissal under M.R.Civ.P. 12(b)(6) will be granted only “when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.” *Shaw v. Southern Aorrstook Comm. Sch. Dist.*, 683 A.2d 502 (Me. 1996) *12 as quoted in *Hall v. Board of Environmental Protection*, 498 A2d 260 (Me. 1985). The review of a ruling on a motion to dismiss is a question of law. *Bean v. Cummings*, 2008 ME 18 (Me. 2008).

Fiduciary Duty and Duty of Care

The duty of care in mortgage transactions is described in **Decision and Order**, *Board of Overseers of the Bar v. Condon*, BAR-08-7, authored by Associate Justice Ellen Gorman, Maine Supreme Court, who wrote:

The Court so finds that it is imperative for the administration of justice and for the protection of the public, that the legal community at large is aware of an attorney's ethical duty to borrowers in a mortgage transaction. Regardless of the attorney's representation of a bank in a given transaction, the attorney also owes duties to the mortgagor, despite the involvement of other non-attorney professionals. (Page 3)

As the closing agent for the [borrower] and the lending institution, [the closing agent] held certain fiduciary duties to ensure that the proper standards of care were provided. (Page 4)

James R. Lemieux and Baxter Title Company, in their Motion to Dismiss rely upon a fiduciary duty described in the case of child molestation by a member of a church, *Bryan R. v. Watchtower Bible & Tract Society of New York, Inc.*, 1999 ME 144 (October 18, 1999). The duty of care and fiduciary duty of care alleged in the instant case is based upon facts in which Nancy Ramsey and James R. Lemieux and Baxter Title Company were involved in a mortgage transaction. These duties of care are established when (1) a Maine resident is involved in a mortgage transaction involving the borrower's residence; (2) the borrower is not represented by separate counsel in said mortgage transaction; *13 and, (3) an attorney and closing agent are the closing agent for the lending institution involved in the said mortgage transaction.

Nancy Ramsey alleges in her complaint all the necessary factual elements necessary to establish the duty of care and the fiduciary duty: (1) Nancy B. Ramsey is an individual Maine resident; (2) Nancy B. Ramsey on August 14, 2006 was a 66 year old single

woman without experience and sophistication to **finance** a multi-unit real estate investment by using her primary residence as the source of funding; (3) The mortgage transaction involved Nancy B. Ramsey's primary residence in Maine; (4) Nancy B. Ramsey was not represented by separate counsel at the closing of the subject mortgage transaction; and, (5) James R. Lemieux and Baxter Title Company represented a large national lender and, were the closing agents for the subject mortgage transaction.

In situations as those set forth in the Amended Complaint, individuals like Nancy B. Ramsey find themselves in a relationship with the closing agent like Baxter Title Company and an attorney like James R Lemieux involving the actual placing of trust and confidence, in fact, by one party (Nancy Ramsey in another (Lemieux and Baxter Title) and a great disparity of position and influence exist between the parties. *See, e.g., Stewart . Machias Savings Bank, 762 A.2d 44 (Me. 2000)*. In *Stewart* the Law Court found no fiduciary duty existed between bank and borrower in the absence of facts showing such a fiduciary relationship. In the present case Lemieux's duty to Ramsey is articulated clearly by Justice Gorman of the Maine Supreme Judicial Court; *14 and, Nancy Ramsey's Amended Complaint alleges the facts necessary to establish the duty of care and fiduciary duty so articulated. In addition, Nancy Ramsey was inexperienced and reliant on the superior knowledge of James R. Lemieux and Baxter Title Company and placed trust and confidence in them that the closing was proper and that even with her concerns about the amount of the monthly payment and the fact that the Interest rate was variable, Attorney Lemieux proceeded with the closing and hurried it along. James R. Leieux's duty to Nancy Ramsey clearly existed under the law and facts alleged in Plaintiffs Complaint; and, whether he breached that duty is a question of fact.

It is a 'fiction' that an attorney in a closing simply is a 'robot'; handing papers to the borrower; point where to sign and date; and, asking the borrower whether she executed the documents as her free act and deed. Such a holding would cast a blind eye to the real facts that all the closing documents are created by lawyers; contain practically unfathomable language and concepts; are lengthy; duplicative and complicated. To believe that in twenty inutes any person is able to read the documents; understand the meaning of the documents; and, determine the actual elements of the transaction truly is a fiction which the Maine Legislature and this Court did not believe when it established the Maine Foreclosure Mediation Program and the Foreclosure Diversion Program. This Court should not be blinded to the reality of Nancy Ramsey's closing; and, the necessity that the closing attorney had some, even if *15 small and basic, duty to Nancy to provide some explanation of the documents being executed.

In her Amended Complaint Nancy Ramsey asserts that, During the closing Nancy Ramsey was provided by Attorney Lemieux a very quick, brief, alleged summaries of the documents she signed; but, was rushed and under pressure as she was told by Baxter Title Company that another closing was scheduled immediately after hers. Nancy Ramseys closing lasted twenty minutes. If Attorney Lemieux provided some explanation, even if brief, doesnt he have a duty to provide a full and complete explanation? Obviously, a closing attorney cannot act like the robot and say nothing but sign and date here“. He provides some explanation. But, can his explanation be false? That would make no sense. But, can his explanation be inadequate? That is all Nancy Ramsey seeks to present to a fact finder.

ISSUE II: Should Appellant's punitive damage claim against Baxter Title Company and James R. Lemieux have been dismissed by the Cumberland County Superior Court?

The trial court properly ruled that, “Punitive damages may only be imposed where compensatory or actual damages are awarded based on the defendants tortuous conduct.” Since the lower court dismissed the claim for compensatory or actual damages; it followed that the court dismiss the punitive damage claim. However, once this Court reverses the dismissal of Count VII of the Amended Complaint; then, it will be proper to allow Nancy Ramsey to proceed on Count VII to obtain punitive damages.

It will be a question of fact whether James R. Lemieux and Baxter Title Company breached their duty to Nancy Ramsey under the circumstances of this case. Then if proven by clear and convincing evidence the conduct was so outrageous that malice may be implied, a jury may consider punitive damages. *See, e.g. Waxler v. Waxier, 1997 ME 190 16, 699 A.2d 116 1, 1165.*

Conclusion

Justice Gorman in her Decision and Order in Condon finally articulates the standards at residential mortgage transactions for closing attorneys and agents. Justice Gorman's insight as to the heart of such mortgage transactions is refreshingly on point. These transactions are not adversarial. A lender wishes to lend money to a borrower. At the closing these parties are not adversaries. They have common interests. The transaction is highly regulated by state and federal laws and regulations. It is in the best interest that all such laws and regulations are obeyed. As the attorney and closing agent, there must be some duty, as Justice Gorman's opines, to ensure that the proper standards of care are respected. Otherwise, neither lender nor borrower is properly served. Finally, in this case a short explanation was provided. Does that not imply to Nancy Ramsey that Attorney Lemieux has some duty to provide her some sort of explanation of the documents? Or, did Mr. Lemieux simply provide some gratuitous explanations which he had no duty to provide; and, had no duty to be accurate. Certainly, this Court would not want to hold that under no circumstances could the lawyer who closed this *17 loan have no responsibility to the borrower; while all the other 'players' from lender, mortgage broker, appraiser and bonding company have a duty.

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